UPPER SEVEN LAW
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July 24, 2024

Molly C. Dwyer, Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: Response to Rule 28(j) Letter in *Imperial Sovereign Court of the State of Montana v. Knudsen*, No. 23-3581 (oral argument held June 4, 2024)

Dear Ms. Dwyer,

Plaintiffs respectfully respond to the State's Rule 28(j) letter filed July 23, 2024, which cites *Friends of George's, Inc. v. Mulroy*, No. 23–5611 (6th Cir. July 18, 2024). Despite a passing resemblance between Montana HB 359 and the Tennessee Adult Entertainment Act ("AEA"), *Friends of George's* is neither "pertinent" nor "significant." Fed. R. App. P. 28(j). Indeed, neither party cited the now-reversed district court ruling in its appellate briefs.

Although *Friends of George's* addresses standing and involves a law that, like HB 359, has been described as a "drag ban," the similarities end there. Unlike HB 359, the AEA incorporates all three of the *Miller/Ginsberg* requirements and preexisting state obscenity law. *Friends of George's*, No. 23-5611, at *5–8. In *Friends of George's*, the

evidence showed that the performances at issue had artistic merit and were appropriate for some minor audiences—thus falling outside of the AEA's purview. *Id.* at *7. Unlike the AEA, HB 359 does not even attempt to fully incorporate the *Miller/Ginsberg* test, and it cannot be read narrowly to apply only to speech that is obscene to minors.

What is more, Ninth Circuit law requires application of a different standard than that applied by the *Friends of George's* majority. Over a vigorous dissent, the Sixth Circuit appeared to hold that standing demands a showing of certain prosecution. *Id.*, at *10–11. Consistent with U.S. Supreme Court precedent, however, this Court requires a "'substantial threat' of enforcement"—which "often rises or falls with the enforcing authority's willingness to disavow enforcement." *Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 489–90 (9th Cir. 2024) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014)) (emphasis added). Here, there has been no disavowal, and Plaintiffs have demonstrated a "substantial threat" of enforcement.

Sincerely,

/s/ *Constance Van Kley*
Constance Van Kley
Counsel for Plaintiffs-Appellees